IN THE SUPREME COURT OF MISSOURI

DONALD AMICK,	)
	) Supreme Court No. SC84677
Plaintiff/Appellant,	) Court of Appeals No. ED80382
	) Circuit Court No. 01CC-1115
v.	)
	)
PATTONVILLE-BRIDGETON TERRACE FIRE PROTECTION DISTRICT,	)
	)
Defendant/Respondent.	)

RESPONDENT'S SUBSTITUTE BRIEF

BRUNTRAGER & BILLINGS, P.C.
DANIEL J. BRUNTRAGER #34546
1735 South Big Bend Boulevard
St. Louis, Missouri 63117
(314) 646-0066 Fax (314) 646-0065

Attorney for Respondent

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II. TABLE OF AUTHORITIES

III. JURISDICTIONAL STATEMENT

This is an appeal from an order of the Circuit Court for the County of St. Louis granting Respondent Pattonville-Bridgeton Terrace Fire Protection District's Motion to Dismiss. The appeal does not involved the validity of any treaty or statute of the United States, or any statute or provision of the constitution of this state, or the construction of the revenue laws of this state, or the title to any office of this state, or the imposition of the punishment of death. This appeal was within the general appellate jurisdiction of the Missouri Court of Appeals as defined in Article V, Section 3, of the Missouri Constitution; however, Respondent's Application for Transfer from the Missouri Court of Appeals, Eastern District, was sustained and this cause was ordered transferred to the Missouri Supreme Court.

IV. STATEMENT OF FACTS

Respondent adopts the statement of facts of the Appellant as provided by Missouri Rules of Civil Procedure 84.04(f).

V. POINT RELIED ON

THE TRIAL COURT DID NOT ERR IN SUSTAINING DEFENDANT FIRE DISTRICT'S MOTION TO DISMISS, BECAUSE THE FIRE DISTRICT DID NOT WAIVE ITS SOVEREIGN IMMUNITY BY OBTAINING MANAGEMENT LIABILITY OR MoFAD COVERAGE IN THAT THERE WAS NO COVERAGE FOR THE SPECIFIC RISK FOR WHICH THE FIRE DISTRICT WAS BEING SUED AND THE INSURANCE POLICIES PROVIDED NO COVERAGE IF THE DISTRICT WAS NOT LEGALLY OBLIGATED TO PAY OR UNLESS COVERAGE WAS EXPLICITLY PROVIDED.

PRINCIPAL CASES

Balderree v. Beeman, 837 S.W.2d 309 (Mo. App. 1992)

Bartley v. Special School District of St. Louis County, 649 S.W.2d 864 (Mo. 1983) (en banc)

Duncan v. Creve Coeur Fire Protection District, 802 S.W.2d 205 (Mo. App. 1991)

State ex rel. Cass Medical Center v. Mason, 796 S.W.2d 621 (Mo. 1990)

State ex rel. Ripley County v. Garrett, 18 S.W.3d 504 (Mo. App. 2000)

OTHER AUTHORITIES

Casey v. Chung, 989 S.W.2d 592 (Mo. App. 1998)

Krasney v. Curators of University of Missouri, 765 S.W.2d 664 (Mo. App. 1989)

Missouri Rules of Civil Procedure 55.26 and 55.27

R.S.Mo. § 105.800

R.S.Mo. § 105.850

R.S.Mo. § 287.780

R.S.Mo. § 321.010

R.S.Mo. § 537.600

R.S.Mo. § 537.610

VI. ARGUMENT

THE TRIAL COURT DID NOT ERR IN SUSTAINING DEFENDANT FIRE DISTRICT'S MOTION TO DISMISS, BECAUSE THE FIRE DISTRICT DID NOT WAIVE ITS SOVEREIGN IMMUNITY BY OBTAINING MANAGEMENT LIABILITY OR MoFAD COVERAGE IN THAT THERE WAS NO COVERAGE FOR THE SPECIFIC RISK FOR WHICH THE FIRE DISTRICT WAS BEING SUED AND THE INSURANCE POLICIES PROVIDED NO COVERAGE IF THE DISTRICT WAS NOT LEGALLY OBLIGATED TO PAY OR UNLESS COVERAGE WAS EXPLICITLY PROVIDED.

On June 18, 2001, appellant filed a single count First Amended Petition alleging respondent Pattonville-Bridgeton Terrace Fire Protection District (hereinafter "Fire District") wrongfully terminated appellant in retaliation for having filed a claim for workers' compensation and, accordingly, violated § 287.780 of the Revised Statutes of Missouri. ("R.S.Mo.") (L.F. 23-36) Section 287.780 prohibits discharge for exercising any rights under the Missouri Workers' Compensation Act, and employees so discharged have an independent tort action for damages. Krasney v. Curators of University of Missouri, 765 S.W.2d 664, 650 (Mo. App. 1989)

Appellant pled, and Fire District agreed, that Fire District is a validly organized fire protection district under R.S.Mo. § 321.010. (L.F. 3, 14, 23) Fire District filed Motions to Dismiss which alleged Appellant's Petition and First Amended Petition failed to state a cause of action for which relief may be granted under Missouri Rules of Civil Procedure 55.26 and 55.27(a)(6). (L.F. 7-9, 10-18, 27-28, 29-32) The above Motions to Dismiss claimed, inter alia, Fire District was immune from judgment and suit under R.S.Mo. § 537.600. The trial court granted the Fire District's motion, and on appeal the Missouri Court of Appeals, Eastern District, reversed the trial court's order.

Amick v. Pattonville-Bridgeton Terrace Fire Protection District, No. ED80382 (Mo. App. E.D., May 7, 2002) On August 27, 2002, this Court accepted transfer.

It is well settled the Fire District is immune for this particular alleged tort. Duncan v. Creve Coeur Fire Protection District, 802 S.W.2d 205, 207 (Mo. App. E.D. 1991) Further, it has been consistently ruled that "any waiver of sovereign immunity is to be construed narrowly." Casey v. Chung, 989 S.W.2d 592, 594 (Mo. App. E.D. 1998); see also Bartley v. Special School District of St. Louis County, 649 S.W.2d 864, 868 (Mo. 1983) (en banc); and State ex rel. Cass Medical Center v. Mason, 796 S.W.2d 621, 623 (Mo. 1990) (en banc)

Appellant seizes upon the insurance policy language of the Emergency Service Management Liability Coverage (hereinafter MLC) to allege Fire District waived immunity under § 537.610.1 R.S.Mo. (Appellant has copied the Fire District's insurance policies twice and inserted the duplicate policies together in the Legal File; Respondent thus will cite to both copies.) The MLC policy provides:

SECTION 1 - COVERAGES

INSURING AGREEMENTS

Coverage A - Liability for Monetary Damages

1. We will pay those sums that the insured becomes legally obligated to pay as monetary damages because of a "wrongful act" to which this insurance applies . . . (L.F. 163; 407) (Appendix 1)

That section also further states: [n]o other obligation or liability to pay sums . . . is covered unless explicitly provided for . . ." (L.F. 163; 407); (Appendix 1) Although the

specific tort Appellant alleges is not explicitly provided for anywhere in the policy, Appellant nonetheless asserts the Fire District waived immunity (and the Court of Appeals agreed) under § 537.610.1 because the acts alleged in the Petition were clearly "wrongful acts" and the Eastern District found that "such broad language encompasses a retaliatory discharge claim". Amick v. Pattonville-Bridgeton Terrace Fire Protection District, supra slip op. at 4-5.

The Eastern District opinion in the present case is in direct conflict with the Southern District's opinion in State ex rel. Ripley County v. Garrett, 18 S.W.3d 504 (Mo. App. S.D. 2000) In Ripley County, the Southern District found that even though the particular torts alleged against the governmental entity were specifically covered (unlike here) in the insurance policy, sovereign immunity still barred the suit. Id. at 507. The Southern District found sovereign immunity attached because the policy provided the insurer would only pay for those damages the insured was "legally obligated to pay". Id. Since the sovereign enjoyed immunity, it could never become legally obligated to pay the claims under the policy. Id.

Although cited by the Eastern District in support of its decision in this case, Respondent believes the Court of Appeals' opinion is also in conflict with State ex rel. Cass Medical Center v. Mason, 796 S.W.2d at 623. In Cass Medical Center, the Court relied on similar policy language found in the present case to determine immunity was not waived under § 537.610.1 Id. Because the political subdivision was never "legally obligated to pay" damages due to its immunity, the claim did not fall under the purposes covered by the insurance. The very risk being sued for, retaliatory discharge under §

287.780 R.S.Mo., is not covered or mentioned in any of the policies purchased by the Pattonville-Bridgeton Terrace Fire Protection District. As noted above, the exceptions to sovereign immunity are to be narrowly construed. Strict construction under § 537.600 or § 537.610 does not require an endorsement stating immunity is not waived. This is true especially when the policy only provides liability when it is "legally obligated to pay". (L.F. 163; 407) This is also especially true when the same policy section cited by the Court of Appeals also contains a section which states: "[n]o other obligation or liability to pay sums . . . is covered unless explicitly provided for . . ." (L.F. 163; 407) The language in the insurance policy in Cass Medical Center contained nearly the same language above. Id. at 623. Again, Appellant cannot point this Court to any place in the Fire District's insurance policies that provide coverage for this particular tort alleged. Cass Medical Center, relying on nearly identical policy language, held that if the claim does not fall under "the purposes covered by the policy of insurance" no coverage exists. Id.

In Balderree v. Beeman, 837 S.W.2d 309, 318-319, (Mo. App. 1992), the Southern District, relying on Cass Medical Center, found the public entity immune from a slander suit. The insurance policy in Balderree contained identical language to the Fire District's policy. Id. at 318. (L.F. 163; 407); (Appendix 1) The Southern District asked whether the public entity's purchase of insurance waived its immunity, and the Court replied "[o]n that issue, we follow Cass Medical Center [citation omitted]. [The public entity's] policy, like the policy there, obligated the insurer to pay sums the insured becomes legally obligated to pay . . . We find nothing in the insurance policy obligating the insurer to pay, on behalf of [public entity], any sum other than which [public entity]

becomes legally obligated to pay." Id. at 319. Nowhere is it mentioned in Balderree that an endorsement to the policy existed barring coverage under the doctrine of sovereign immunity. Nor should such a technical, superficial requirement of such precise language be required.

By requiring an endorsement to the policy specifically excluding coverage for damages barred by sovereign immunity, this, in essence, requires form over substance. This also looks backwards at § 537.610.1. Rather than immunity being waived "only for the purposes covered by such policy of insurance purchased," the Eastern District's opinion now requires governmental entities to specifically exclude in an endorsement all coverage in form before immunity would attach. Why require surplusage (like an endorsement) when § 537.610.1 not only does not require it, but the immunity is waived only under the narrowest terms and "only" on the purposes covered? And why require surplusage (like an endorsement) when the policy already states it will pay only damages the political subdivision is "legally obligated to pay" and "no other obligation or liability . . . is covered unless explicitly provided for"? No additional formality of language should be required. To require a specific exclusion of coverage for damages otherwise barred by immunity allows the exceptions to immunity to swallow the rule. Governmental entities are now faced with the uncertainty of purchasing insurance and risking a waiver of its immunity because precise, specific language of its policy may not withstand judicial scrutiny. Certainly § 537.610.1 was not enacted to place governmental entities in such peril.

Moreover, Appellant claims Fire District violated § 287.780. (L.F. 23-26) However, later in the same section of the insurance policy at issue, contains an exclusion. The policy excludes any coverage for a "willful violation of any statute." (L.F. 166; 410); (Appendix 4) Appellant makes this very same claim.

Appellant next relies on the Fire District's self-insurance pool under MoFAD. (L.F. 518) However, MoFAD covers only workers' compensation liability; Appellant alleges a tort. Krasney, 765 S.W.2d at 650. Nothing in MoFAD covers a tort claim under § 287.780. (L.F. 518) The "waiver of sovereign immunity . . . must be by express consent to be sued." Id. The self-insurance program (which the Fire District is a member) is not compensable, under the workers' compensation scheme, for this alleged tort. A careful review of MoFAD's coverage clearly demonstrates this. It states MoFAD is "legally responsible to provide only benefits as defined under the Workers' Compensation Laws of the State of Missouri to injured employees." (L.F. 518) (emphasis added) MoFAD does not provide damages under a tort claim which appellant alleged; rather it provides employee benefits. This fact is bolstered by §§ 105.800 through 105.850, which extended the provisions of the Workers' Compensation Act to include all state employees. R.S.Mo. § 105.850 provides: "Nothing in sections 105.800 to 105.850 shall ever be construed as acknowledging or creating any liability in tort or as incurring other obligations or duties except only the duty and obligation of complying with the provisions of chapter 287, R.S.Mo." Indeed, as was held in Krasney, neither § 287.780 "or any other component of the Workers' Compensation Law expresses an intention to

submit a governmental entity to liability for tort for breach of that retaliation discharge provision." Id. Appellant's reliance on MoFAD is without merit.

Appellant's appeal should be denied.

VII. CONCLUSION

Because of the foregoing reasons and authorities cited, the trial court properly ruled that respondent was immune from suit under § 537.600 and § 537.610.1.

BRUNTRAGER & BILLINGS, P.C.

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DANIEL J. BRUNTRAGER #34546
Attorney for Respondent
1735 South Big Bend Boulevard
St. Louis, Missouri 63117
(314) 646-0066 Fax (314) 646-0065